Estate & Forestry Consulting Management v Koperasi Permodalan Melayu Negeri Johor Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO (MT-1) 22–130 OF 2006
VERNON ONG JC
5 JANUARY 2010

Contract — Breach — Damages — Remoteness of damages — Whether loss arose in usual course of things from breach — Whether likelihood of loss within contemplation of parties — Whether loss not proven recoverable.

Contract — Breach — Effect of breach — Refusal by plaintiff to wholly perform obligation under contract — Whether agreement voidable at defendant's option — Contracts Act 1950 s 40

Contract — Breach — Waiver of — Failure of plaintiff to complete project within agreed period — Alleged that delay caused by defendant's breach in providing security deposits — Whether subsequent conduct of plaintiff asking for extension amounted to waiver of defendant's breach

Contract — Time — No time specified for performance — Obligation to be carried out within reasonable time — What constituted reasonable time — Contracts Act 1950 s 47

The defendant appointed the plaintiff to undertake the development and planting of oil palm on the lands owned by the defendant. The project was to be completed within 36 months and the defendant agreed to pay the plaintiff RM40m upon the completion of the project. Under the agreement the defendant agreed to provide a security deposit of up to RM25m to the bank as security for a loan taken by the plaintiff. The defendant also agreed to provide the plaintiff a banker's letter of guarantee of RM15m payable upon the completion of the project. The plaintiff contended that the defendant committed the following breaches of the agreement in that: (i) the defendant only placed a security deposit of up to RM13m which affected the drawdown by the bank to the plaintiff; (ii) the defendant failed to provide the banker's letter of guarantee of RM15m; and (iii) the defendant failed to pay to the plaintiff the total development costs leaving a balance of RM8,467,712.35. In consequence of the defendant's breaches the plaintiff claimed the balance of the total development costs, loss of income and damages for termination

of the agreement. The defendant on the other hand contended that the plaintiff failed to complete the project to develop and maintain the oil palm plantation on the defendant's land in accordance with the agreement. The defendant claimed that there was delay in the progress of the development of the plantations and that there was poor performance in developing the plantations. The defendant counterclaimed for: (a) the loss of potential income that the defendant would have earned had the project been completed in accordance with the agreement; (b) the rental of the land paid to YAKIN (c) loss of security deposit; and (d) damages due to the plaintiff's failure to deliver a duly completed plantation in accordance with the agreement.

Held, dismissing the plaintiff's claim with costs and allowing the defendant's counterclaim with costs:

(1) The security deposit was not a fixed sum of RM25m. It was such sum as may be agreed between the parties and not exceeding RM25m. Pursuant to the third party memorandum of deposit, the defendant had agreed to provide the security deposit of RM25m to the bank in accordance with the schedule. The first and second instalments of RM1m and RM4m respectively were provided by the defendant in accordance with the schedule. The third instalment of RM4m was also provided albeit six days late. The defendant did not provide the fourth instalment of RM16m which was due by 1 June 2003. Pursuant to a project management meeting on 10 July 2003 at the plaintiff's request the defendant provided three additional security deposits, the first for RM2.5m on 17 July 2003, the second for RM700,000 on 3 December 2003 and the third for RM800,000 on 15 December 2003. If the parties had intended that the total sum and time should be of the essence in the placement of the security deposits, this had been waived by the subsequent conduct and negotiations of the parties. Further, the plaintiff's subsequent conduct in asking the defendant for an extension of time of six months to complete and hand over the project also amounted to a waiver (see paras 15–17).

(2) Section 2.01(3) of the agreement stipulated that a banker's letter of guarantee of RM15m shall be provided to the plaintiff. There was, however, no stipulation as to when the letter of guarantee should be provided. Where no time for performance is specified, the obligation should be performed within a reasonable time. This principle is encapsulated in s 47 of the Contracts Act 1950 ('Act'). What is a reasonable time is a question of fact depending on the surrounding circumstances of the case. The letter of guarantee ought to have been provided by the defendant to the plaintiff within a reasonable period prior to the handing-over date. As the plaintiff abandoned the project

on 13 September 2004 this issue was immaterial as the prescribed occasion (of the handing over of the development project) did not arise (see paras 18–19 & 21).

(3) The plaintiff's complaint that it could not obtain loan facilities was not a relevant factor. There is no evidence to show that the bank stopped disbursing the loan to the plaintiff (see para 31).

(4) The defendant's rejection of the plaintiff's application for extension of time was in accordance with section 10.02(3) of the agreement which stipulated that there shall be no extension of time for completion. There was also an express stipulation that time shall be of the essence of the agreement (see para 32).

(5) The plaintiff promised to complete and hand over the project within 36 months. The plaintiff has not only failed to wholly perform the obligation; it has also refused to perform its promise in its entirety. The agreement is therefore voidable at the defendant's option. When it became clear that the plaintiff had no intention of performing its obligations under the agreement the defendant terminated the agreement pursuant to s 40 of the Act. By reason of the plaintiff's breach of its obligations under the agreement the plaintiff was not entitled to any form of compensation and any portion of the consideration (see para 34).

(6) It must have been within the contemplation of the parties when they entered into the agreement that the defendant would be likely to suffer a loss of income from the harvesting and sale of the oil palm fruit from the plaintiff's breach of the agreement. Therefore this loss was recoverable. The rental for the lands paid by the defendant to YAKIN was not a loss or damage which arose in the usual course of things from the breach. The defendant also did not suffer any loss as a lessee. As such, the rental was not recoverable. As the plaintiff failed to repay the loan facility the bank debited the defendant's security deposit. The loss of the security deposit was liable to be reimbursed by the plaintiff under the express provisions of the agreement and as such was recoverable. In relation to the loss for being deprived of a duly completed oil palm plantation in accordance with the agreement, the claim was not proven and thus was not recoverable (see paras 38–40).

[Bahasa Malaysia summary

Defendan telah melantik plaintif untuk menjalankan pembangunan dan penanaman kelapa sawit di atas tanah yang dimiliki oleh defendan. Projek itu patut siap dalam tempoh 36 bulan dan defendan telah bersetuju untuk membayar plaintif RM40 juta setelah siap projek itu. Di bawah perjanjian defendan bersetuju memberikan deposit sekuriti sehingga RM25 juta kepada bank sebagai sandaran untuk pinjaman yang diambil oleh plaintif. Defendan

juga bersetuju memberikan kepada plaintif sepucuk surat jaminan bank sejumlah RM15 juta yang perlu dibayar setelah siap projek itu. Plaintif menegaskan bahawa defendan telah melakukan pelanggaran-pelanggaran perjanjian berikut di mana: (i) defendan telah hanya meletakkan deposit sekuriti sehingga RM13 juta yang menjejaskan pengeluaran oleh bank kepada plaintif; (ii) defendan telah gagal memberikan surat jaminan bank sejumlah RM15 juta; (iii) defendan telah gagal membayar plaintif keseluruhan kos-kos pembangunan meninggalkan baki RM8,467,712.35. Akibat daripada pelanggaran-pelanggaran defendan, plaintif telah menuntut baki keseluruhan kos-kos pembangunan, kehilangan pendapatan dan ganti rugi kerana penamatan perjanjian itu. Defendan sebaliknya menegaskan bahawa plaintif telah gagal untuk menyiapkan projek untuk memaju dan menyelenggarakan ladang kelapa sawit atas tanah defendan menurut perjanjian itu. Defendan mendakwa bahawa terdapat kelewatan dalam perkembangan pembangunan ladang-ladang itu dan bahawa terdapat pelaksanaan yang lemah dalam memajukan ladang-ladang itu. Defendan telah menuntut balas untuk: (a) kehilangan pendapatan berpotensi yang mungkin dapat diperoleh oleh defendan sekiranya projek itu disiapkan menurut perjanjian; (b) sewa tanah yang dibayar kepada YAKIN; (c) kehilangan deposit sekuriti; dan (d) ganti rugi akibat kegagalan plaintif untuk menyerahkan ladang yang telah siap menurut perjanjian.

Diputuskan, menolak tuntutan plaintif dengan kos dan membenarkan tuntutan balas defendan dengan kos:

(1) Deposit sekuriti bukan jumlah tetap sejumlah RM2 juta. Ianya sejumlah yang mungkin dipersetujui antara pihak-pihak dan tidak melebihi RM25 juta. Menurut memorandum deposit pihak ketiga, defendan telah bersetuju memberikan deposit sekuriti sejumlah RM25 juta kepada bank menurut jadual. Ansuran-ansuran pertama dan kedua yang masing-masingnya berjumlah RM1 juta dan RM4 juta diperuntukkan oleh defendan menurut jadual. Ansuran ketiga berjumlah RM4 juta juga telah diperuntukkan meskipun lewat enam hari. Defendan tidak memberikan ansuran keempat berjumlah RM16 juta yang perlu dibayar sebelum 1 Jun 2003. Menurut mesyuarat projek pengurusan pada 10 Julai 2003 atas permintaan plaintif defendan telah memberikan tiga lagi deposit sekuriti, yang pertama berjumlah RM2.5 juta pada 17 Julai 2003, yang kedua berjumlah RM700,000 pada 3 Disember 2003 dan yang ketiga berjumlah RM800,000 pada 15 Disember 2003. Sekiranya pihak-pihak telah berniat bahawa keseluruhan jumlah itu dan masa adalah penting bagi peletakan deposit sekuriti, ini telah diketepikan oleh perbuatan dan perundingan pihak-pihak berikutnya. Selanjutnya, perbuatan plaintif berikutnya

yang bertanyakan kepada defendan untuk lanjutan masa selama enam bulan bagi menyiapkan dan menyerahkan projek itu juga membentuk penepian (lihat perenggan 15–17).

(2) Seksyen 2.01(3) perjanjian menetapkan bahawa surat jaminan bank berjumlah RM15 juta hendaklah diberikan kepada plaintif. Walau bagaimanapun, tidak terdapat syarat berhubung bila surat jaminan itu patut diberikan. Di mana tiada masa untuk pelaksanaan ditetapkan, kewajipan itu hendaklah dilaksanakan dalam tempoh yang munasabah. Prinsip ini termaktub dalam s 47 Akta Kontrak 1950 ('Akta'). Apakah masa yang munasabah adalah persoalan fakta bergantung kepada keadaan sekeliling kes. Surat jaminan patut diberikan oleh defendan kepada plaintif dalam tempoh munasabah sebelum tarikh penyerahan. Oleh sebab plaintif telah menghentikan projek itu pada 13 September 2004 isu ini adalah tidak penting kerana masa yang ditetapkan (untuk menyerahkan projek pembangunan itu) tidak timbul (lihat perenggan 18–19 & 21).

(3) Aduan plaintif bahawa ia tidak boleh memperoleh kemudahan pinjaman bukan faktor relevan. Tidak ada keterangan yang menunjukkan bahawa bank telah berhenti membayar pinjaman kepada plaintif (lihat perenggan 31).

(4) Penolakan defendan terhadap permohonan lanjutan masa plaintif adalah menurut seksyen 10.02(3) perjanjian yang menetapkan bahawa tidak patut ada lanjutan masa untuk siap. Terdapat juga syarat jelas bahawa masa adalah inti pati perjanjian (lihat perenggan 32).

(5) Plaintif berjanji untuk menyiapkan dan menyerahkan projek itu dalam tempoh 36 bulan. Plaintif bukan sahaja gagal untuk melaksanakan keseluruhan kewajipan itu; ia juga enggan melaksanakan janjinya secara keseluruhannya. Oleh demikian perjanjian itu boleh batal atas pilihan defendan. Apabila jelas bahawa plaintif tiada niat untuk melaksanakan kewajipannya di bawah perjanjian itu defendan telah menamatkan perjanjian itu menurut s 40 Akta. Oleh sebab pelanggaran kewajipan plaintif di bawah perjanjian plaintif tidak berhak mendapat apa-apa bentuk pampasan dan apa-apa bahagian daripada balasan itu (lihat perenggan 34).

(6) Pihak-pihak mungkin telah membuat pertimbangan apabila mereka memasuki perjanjian bahawa defendan berkemungkinan akan mengalami kehilangan pendapatan akibat daripada kerja-kerja memetik dan jualan buah kelapa sawit daripada pelanggaran perjanjian plaintif. Oleh itu kerugian ini boleh didapatkan balik. Sewa untuk tanah yang dibayar oleh defendan kepada YAKIN bukan satu kehilangan atau kerugian yang timbul dalam urusan biasa akibat pelanggaran. Defendan juga tidak mengalami apa-apa kerugian sebagai pemajak. Oleh itu, sewa

itu tidak boleh didapatkan balik. Oleh sebab plaintif gagal membayar balik kemudahan pinjaman itu bank telah mendebitkan deposit sekuriti defendan. Kehilangan deposit sekuriti adalah tanggungjawab plaintif untuk membayar balik di bawah peruntukan nyata perjanjian dan oleh itu boleh didapatkan balik. Berkaitan kerugian kerana terkilan akan ladang kelapa sawit yang sepatutnya siap menurut perjanjian, tuntutan itu tidak terbukti dan oleh itu tidak boleh didapatkan balik (lihat perenggan 38–40).]

Notes

For cases on breach generally, see 3 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2566–2823.

For cases on damages, see 3 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2644–2670.

For cases on time generally, see 3 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5488–5517.

For cases on waiver of, see 3 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2807–2810.

Cases referred to

Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76, SC (refd)

Hadley & Anor v Baxendale & Ors (1854–60) All ER Rep 461, PC (folld)

Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65, CA (refd)

Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor [1976] 2 MLJ 177, HC (refd)

Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd [1994] 3 MLJ 569, SC (refd)

Nyap Kui Fah v Len On Contractor [1978] 1 MLJ 208, FC (refd)

Tan Chin Kim Sawmill and Factory Sdn Bhd & Anor v Lindeteves-Jacoberg (M) Sdn Bhd & Anor [1980] 2 MLJ 204, HC (refd)

Tan Chong & Sons Motor Company (Sdn) Berhad v Alan McKnight [1983] 1 MLJ 220, FC (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (refd)

Toeh Kee Keong v Tambun Mining Co Ltd [1968] 1 MLJ 39, FC (folld)

Legislation referred to

Contracts Act 1950 ss 40, 47, 56, 74
Environmental Quality Act 1974 s 34A
Interpretation Acts 1948 and 1967 s 54(2)

Yusri Farid (Nasir Aziz with him) (Yusri Nasir Aziz & Partners) for the plaintiff.
Sabri Kassim (Abu Talib Shahrom) for the defendant.

Vernon Ong JC:

[1] Estate & Forestry Consulting Management Sdn Bhd ('the plaintiff') was appointed by Koperasi Permodalan Melayu Negeri Johor Bhd ('the defendant') to develop an oil palm estate for the defendant on the defendant's lands. To undertake the development the plaintiff obtained a loan facility from a bank. The plaintiff contends that development of the project was affected by the defendant's failure to provide the security deposit to the bank of RM25m which affected the drawdown by the bank to the plaintiff.

THE PLAINTIFF'S CASE

[2] The defendant appointed the plaintiff to undertake the development and planting of oil palm on the lands owned by the defendant. The project was to be completed within 36 months and the defendant agreed to pay to the plaintiff RM40m upon the completion of the project. Under the agreement the defendant agreed to provide a security deposit of up to RM25m to the bank as security for a loan taken by the plaintiff. The defendant also agreed to provide to the plaintiff a banker's letter of guarantee of RM15m payable upon the completion of the project. It is contended that the defendant committed the following breaches of the agreement in that:

(a) the defendant only placed a security deposit of up to RM13m which affected the drawdown by the bank to the plaintiff;

(b) the defendant failed to provide the banker's letter of guarantee of RM15m; and

(c) the defendant failed to pay to the plaintiff the total development costs leaving a balance of RM8,467,712.35.

[3] In consequence of the defendant's breaches the plaintiff is claiming for the following:

(a) RM8,467,712.35 being the balance of the total development costs;

(b) RM10,308,000 for the loss of income;

(c) damages for termination of the agreement;

(d) interest and costs.

THE DEFENDANT'S CASE AND COUNTERCLAIM

[4] The defendant contends that the plaintiff failed to complete the project to develop and maintain the oil palm plantation on the defendant's land in

A accordance with the agreement. The breaches are as follows:

(a) delay in the progress of the development of the plantations;

(b) poor performance in developing the plantations;

B (c) the plaintiff's failure to make progress reports despite various reminders;

(d) the plaintiff proceeded with felling activities in contravention of s 34A of the Environmental Quality Act 1974.

C **[5]** The defendant did not commit a breach of the agreement when it provided the security deposit of RM13m as the agreement did not fix the security deposit at RM25m. Further there is no back-to-back provision in the loan facility from the bank to the plaintiff, and the third party memorandum of deposit between the defendant and the bank, that if the defendant did not pay the security deposit of up to RM25m then the bank will not disburse the D loan. The defendant did not provide the banker's letter of guarantee of RM15m because the plaintiff did not deliver the project as promised. Further, there is no time line for the defendant to provide the banker's letter of guarantee of RM15m.

E **[6]** The defendant refused the plaintiff's application for extension of time to hand over the project as time is of the essence of the agreement. When the plaintiff abandoned the project the defendant accepted the plaintiff's repudiation under s 40 of the Contracts Act 1950. The plaintiff is not F entitled to any form of compensation under section 14.03(1) of the agreement.

[7] The defendant is counterclaiming for the loss of potential income of RM13,750,000 that the defendant would have earned had the project been G completed in accordance with the agreement. The defendant is also counterclaiming for (i) the rental of the land paid to YAKIN of RM717,797; (ii) loss of security deposit of RM14m; and (iii) damages of RM27,482,090 arising out of the plaintiff's failure to deliver a duly completed plantation in accordance with the agreement.

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THE FACTS AS DISCLOSED IN THE EVIDENCE

[8] Through its wholly-owned subsidiary company Teroka Pertiwi Sdn Bhd, the defendant owns three pieces of land containing a total area of I approximately 10,291.69 acres ('the lands'). The plaintiff represented to the defendant that it has the requisite technology, expertise, experience and financial resources to undertake the development and planting of oil palm. By an Oil Palm Plantation And Development Agreement dated 12 September 2001 ('the agreement') the plaintiff agreed to undertake the project

development of the lands into an oil palm plantation in consideration of the sum of RM40m. The pertinent terms of the agreement are as follows:

(a) the plaintiff shall undertake the project development of the lands into an oil palm plantation in accordance with the project works specifications ((1)(1), article VI)

(b) the plaintiff agreed to undertake the project development of the lands entirely at their own cost and expense (section 2.01(1));

(c) the defendant shall, at the request of the bank and the plaintiff, place with the bank a sum of not more than RM25m by way of security deposit (section 2.01(2));

(d) the defendant will provide a banker's letter of guarantee of RM15m which shall be deemed to be payable upon the delivering and successful planting in accordance with the project work specifications (section 2.01(3));

(e) the completion of the project development shall be not later than 36 months from the date of the agreement (section 2.01(1));

(f) upon the completion of the project in accordance with the agreement the defendant shall pay to the plaintiff the consideration of RM40m (section 2.01(1)); and

(g) time shall be of the essence of the agreement (section 18.12).

[9] On 6 December 2001 the plaintiff obtained a loan facility of RM25m from Bank Pertanian Malaysia ('the bank') to finance the development costs of the project. As security for the loan the plaintiff agreed to provide a security deposit of RM25m in four instalments. By a letter dated 11 March 2002 the bank informed the plaintiff that the security deposit of RM25m will be provided by the defendant in instalments according to a schedule. Pursuant thereto the defendant executed a third party memorandum of deposit dated 22 March 2002 ('MOD') with the bank wherein the defendant agreed to deposit investment account certificate(s) for the total sum of RM25m to be held by the bank as a continuing security for the due payment to the bank by the plaintiff. The deposits were to be made according to the following schedule:

Date	Amount
1 December 2001	RM1,000,000
1 March 2002	RM4,000,000
1 June 2002	RM4,000,000
1 June 2003	RM16,000,000

[10] In furtherance to the above the defendant deposited RM1m with the bank on 30 November 2001. The second and third deposits of RM4m each were made on 27 February 2002 and 7 June 2002 respectively. On 17 July 2003 the defendant made the fourth deposit of RM2.5m. The fifth deposit of RM700,000 was made on 3 December 2003 and the last deposit of RM800,000 on 15 December 2003. In total the security deposit provided by the defendant amounted to RM13m.

[11] On 3 January 2002 the plaintiff commenced the project development work on the lands. From the commencement date to the date the plaintiff abandoned the project the plaintiff submitted seven progress claims to the defendant:

No	Date	Amount
1	11 March 2002	RM5,041,768
2	16 May 2002	RM3,616,140
3	4 July 2002	RM3,589,150
4	15 December 2002	RM4,599,100
5	1 June 2003	RM2,107,350
6	6 November 2003	RM3,724,583
7	20 April 2004	RM2,934,240
		---------- RM26,692,000 ----------

[12] Out of the total claim amount of RM26,692,000, the defendant approved RM21,224,287.65. At a meeting between the parties on 10 July 2003 the plaintiff informed the defendant that they were having financial difficulties. The defendant then agreed to deposit RM4m in security deposit with the bank. On 4 May 2003 the plaintiff wrote to the defendant informing of its intention to hand over Ladang Ari on 30 June 2004, Ladang Ulu Nenggiri on 31 January 2004 and Ladang Chiku on 31 February 2004. On 14 May 2004 the defendant replied asking for the progress reports to confirm that the project works have been completed according to specifications. The defendant issued a reminder to the plaintiff on 2 June 2004. On 10 June 2004 the defendant informed the plaintiff that it was not agreeable to the plaintiff's proposal and that it would take delivery of the project on 11 November 2004. The plaintiff replied to the defendant on 20 June 2004 appealing for an extension of six months to complete the project works. By a letter of 11 August 2004 the defendant informed it is not agreeable to the plaintiff's application for an extension of time. On 13 September 2004 the plaintiff ceased all works and removed all its workers, equipment and machinery from the lands.

ISSUES TO BE TRIED

(1) Whether the defendant committed a breach of the agreement when it did not provide the security deposit of RM25m.

(2) Whether the defendant committed a breach of the agreement when it did not provide the banker's letter of guarantee of RM15m.

(3) Whether the plaintiff committed a breach of the agreement when it abandoned the project on 13 September 2004.

FINDINGS OF THE COURT

Whether the defendant committed a breach of the agreement when it did not provide the security deposit of RM25m

[13] The plaintiff's contention is that the defendant agreed to provide RM25m in security deposit with the bank in accordance with the schedule which is set out in the bank's letter of offer dated 6 December 2001 and in the MOD. The defendant committed a breach of the agreement as it has only provided a total of RM13m in security deposit. The defendant contends that its obligation under the agreement is only to provide a security deposit of up to a maximum of RM25m. The security deposit is not fixed at RM25m; it can be any amount less than RM25m.

[14] Section 5.01 of the agreement provides that the defendant shall at the request of the bank deliver to and place with the bank from time to time a sum up to a maximum of RM25m by way of security deposit. At the same time section 2.01(2) stipulates that the defendant shall provide the security deposit at the request of the bank and the developer. The schedule referred to by the plaintiff is contained in item 10 'Cagaran/Jaminan' of the bank's letter of offer to the plaintiff. A similar schedule is also found in the MOD.

[15] Whether the defendant is obliged to provide RM25m in security deposit is to be construed by reference to the agreement. Section 2.01(2) states that the security deposit shall be 'a sum of not more than' RM25m. Section 5.01(1) states that the security deposit shall be 'a sum as agreed and determined by the parties hereto up to a maximum of not more than' RM25m. In both instances it appears that the security deposit is not a fixed sum of RM25m. It is such sum as may be agreed between the parties and not exceeding RM25m. If so, is there any agreement between the plaintiff and the defendant on the amount of the security deposit? In this regard the letter of offer can be discounted as the defendant is not privy to it. The MOD is more pertinent as the defendant has agreed to 'deposit with the Bank Investment Account Certificate from time to time particularly specified in the Schedule hereto and made out in the Bank's favour for the total sum of RM25m' (cl 1.1). In the light of the MOD, it can be seen that the defendant agreed to provide the security deposit of RM25m to the bank in accordance with the schedule.

[16] The first and second instalments of RM1m and RM4m respectively were provided by the defendant in accordance with the schedule. The third instalment of RM4m was also provided albeit six days late. The defendant did not provide the fourth instalment of RM16 which was due by 1 June 2003. Pursuant to a project management meeting on 10 July 2003 at the plaintiff's request the defendant provided three additional security deposits, the first for RM2.5m on 17 July 2003, the second for RM700,000 on 3 December 2003 and the third for RM800,000 on 15 December 2003. If the parties had intended that the total sum and time should be of the essence in the placement of the security deposits, this had been waived by the subsequent conduct and negotiations of the parties at the said meeting. That the plaintiff acquiesced to this arrangement is also borne by the fact that the plaintiff did not raise this issue after the said meeting or in any of its letters dated 8 February 2004, 4 May 2004 and 20 June 2004 to the defendant. The plaintiff only raised this issue in its solicitor's letter dated 16 August 2004. Even then, the plaintiff's objection has been waived by the plaintiff's subsequent conduct in its letter to the defendant on 20 June 2004 asking for an extension of time of six months to complete and hand over the project.

[17] As the requirement for the provision of the security deposit of RM25m has been waived by the subsequent conduct of the plaintiff in the manner aforesaid, the question is accordingly answered in the negative.

Whether the defendant committed a breach of the agreement when it did not provide the banker's letter of guarantee of RM15m

[18] Section 2.01(3) of the agreement stipulates that a banker's letter of guarantee of RM15m shall be provided to the plaintiff. There is, however, no stipulation as to when the letter of guarantee should be provided. In this situation where no time for performance is specified, the obligation should be performed within a reasonable time. This principle is encapsulated in s 47 of the Contracts Act 1950 which provides as follows:

> 47 Time for performance of promise where no application is to be made and no time is specified
>
> Where, by the contract, a promisor is to perform his promise without application by the promises, and no time for performance is specified, the engagement must be performed within a reasonable time. Explanation — The question 'what is a reasonable time' is, in each particular case, a question of fact.

[19] What is a reasonable time is a question of fact depending on the surrounding circumstances of the case. In *Nyap Kui Fah v Len On Contractor* [1978] 1 MLJ 208 the Federal Court took the following view at p 209:

Where no time is set for the performance of the contract the law implies that performance must be completed within a reasonable time having regard to the circumstances.

[20] In this connection it is also useful to note that s 54(2) of the Interpretation Acts 1948 and 1967 which provides that 'where no time is prescribed within which anything should be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises' (see also *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65 (CA); *Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor* [1976] 2 MLJ 177 (HC)).

[21] Applying the principles enunciated above it can be seen that the banker's letter of guarantee shall be deemed to be payable upon the delivery and successful planting according to the project specifications. The occasion upon which the banker's letter of guarantee arises is therefore the date on which the delivery of the oil palm plantation to the defendant takes place. The date for the completion and handing over of the development project to the defendant is 3 January 2005 — being a date falling at the end of 36 months calculated from the date the plaintiff entered into the lands on 3 January 2002. In the premises the banker's letter of guarantee should be provided prior to the handing-over of the project development. The letter of guarantee ought to have been provided by the defendant to the plaintiff within a reasonable period prior to the handing-over date. The plaintiff did make any prior request or demands to the defendant for banker's letter of guarantee. The plaintiff's complaint on this issue only arose after this action was filed. Clearly, this was a non-issue until the matter was litigated. Further, as the plaintiff abandoned the project on 13 September 2004 this issue is immaterial as the prescribed occasion (of the handing over of the development project) did not arise. In the premises the question is answered in the negative.

Whether the plaintiff committed a breach of the agreement when it abandoned the project on 13 September 2004

[22] Under the agreement the plaintiff agreed to complete and hand over the project development to the defendant no later than 36 months from the date the plaintiff entered the lands to commence the project development work. As the plaintiff commenced the project development on 3 January 2002, the completion and handing-over date will fall on 3 January 2005. However, the plaintiff abandoned all works and removed all its workers, equipment and machinery from the project site on 13 September 2004.

[23] The project development was experiencing delays for a number of reasons. According to the defendant's general manager Hj Ariff bin Kassim ('DW1') the development of the project was delayed. At a project management meeting between the plaintiff and the defendant on 3 March 2003 DW1 expressed deep concern about the state of the plantations after his visits to the project site on 18–21 February 2003. In this regard Nordin bin Ishak ('DW3') a former estate manager for the defendant corroborated DW1's evidence when he said that the development work was falling behind schedule and that the plantation was not been maintained. At another project management meeting on 8 May 2003 the performance of the project works was discussed and it was noted that:

(a) the development did not follow the schedule which stipulated that by April 2003 10,000 acres ought to have been completely planted;

(b) the progress reports were found to be inconsistent making it difficult to verify the actual works and progress reported;

(c) only 2,224 acres out of 10,000 acres have been planted, ie, only 22%; and

(d) the map drawn up by the plaintiff did not show the areas which have already been planted.

(para 4.2, Minit Mesyuarat Jawatankuasa Pengurusan Projek Ladang Teroka Pertiwi Sdn Bhd (exh P14)).

[24] Monthly reports (exhs D20 to D24) on the progress of the development works were prepared by DW3 which contained details showing that the development works were behind schedule and that the plantations were not being maintained. In addition, the plaintiff failed to submit regular progress reports to the defendant on a quarterly basis in breach of section 18.01 of the agreement. Despite the defendant's reminders to the plaintiff under letters dated 5 March 2003, 2 April 2003 and 29 April 2003 the plaintiff failed to furnish the progress reports. The plaintiff also began with felling activities on certain areas of the lands without receiving the necessary EIA approval under the Environment Quality Act 1974 from the Department of Environment Negeri Kelantan.

[25] An assessment on the status of the development, standard and quality of the project development on a 'as is' basis was subsequently commissioned by the defendant. The assessment was undertaken by Tanisoft Sdn Bhd. The report (exh D25) was tendered by its managing director Chee Chuan Chai (DW5). The following are some of the pertinent findings:

3.4 Terracing/Platforms

(a) In view of largely hilly terrain, terrace planting covers more than 85% of plantable areas for both estates. Where inspected steeper lower slopes and ravine edges were generally noted without planting terraces or platforms.

(b) Terraces constructed were generally with inadequate back-slopes and without the two-feet stops put in at minimum of 15 feet intervals as specified in the Agreement.

(d) Broken terraces were not repaired and maintained as provided for in the Agreement.

3.5 Roads

(a) Roads constructed do not appear adequate both in terms of layout and required carry distance of not more than 140 meters. There were obvious lack of roads put in for lower slopes, foothills and the ravine areas. There were no records on measurements and types of roads constructed for each planted block.

3.6 Legume Cover

(a) Legume ground cover were hardly noted anywhere in both the project area, if at all planted. Palm interlines have completely been taken over by thick woody growths including bamboo, wild bananas, brackens, lalang and other undesirables due to prolonged neglect. This is not in line with the stipulated requirement in the Agreement to establish and maintain pure legume cover until the end of the specified period.

4. Project Status – Oil Palm Planting and Standard of Field Upkeep

(b) Field upkeep was not carried out for planted areas as provided for in the Agreement and along standard industry practice. Planted blocks deteriorated with most sections taken over by overgrown woody and secondary growths which became ideal habitats for pests such as notorious wild boars, porcupines and rats.

(c) For Ladang Aring, field palms have generally disappeared due to lack of follow-up field maintenance and effective control measures taken to prevent extensive pest attacks right from early stages of development.

(d) Planting of 849.80 hectares in Ladang Nenggiri can be described as a total failure with reported loss of most planted palms to pests including wild elephants and wild boars.

(e) The poor field conditions and planting failure in both the estates reflected well on the lack of attention on field upkeep and manuring in line with specifications set out in the Development Agreement namely:-

- Manual weeding for first 12 months after planting.
- Circle spraying from second year.
- Control of all noxious weeds in the palm interlines of planted areas.

A • Manuring in accordance to standard immature palm schedule,

4.2 The poor standard of project development and upkeep could largely be attributed to the lack of minimum back-up support for the project to be successful including experienced staff, adequate workers located on project site and necessary machinery and equipment which should be in good working order. There could also be cash flow problems to carry out field operations along set schedule and according to work specifications. Based on information supplies for the reports, the Developer maintained skeletal manpower and machinery back-up for development and maintenance of the two projects ...

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[26] In addition to the aforesaid meetings and letters, the defendant have also repeatedly complained to the plaintiff on numerous occasions vide letters dated 16 July 2003, 28 July 2003, 17 September 2003 and 9 October 2003 and on 17 September 2003 under cover letter of Teroka Pertiwi Sdn Bhd. The plaintiff did not respond to the defendant's numerous written complaints; instead the plaintiff assured the defendant at the project management meetings on 8 May 2003 and 10 July 2003 that they will complete the project on time.

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[27] The plaintiff contends that the delay in the development works was caused by workers and the poor weather. Most of the problems which came up during the development period can be corrected and improved. The shortage of workers was improved by the plaintiff for Ladang Aring from 74–191 workers within two months. Rainfall which affected the development progress was beyond the plaintiff's control. The plaintiff also contends that the development works was affected as the amount of the loan disbursed by the bank was insufficient. This was caused by the defendant's failure to provide sufficient security deposit and the banker's letter of guarantee. Further, the defendant failed to increase the security deposit despite the plaintiff's request. In addition the delay was caused by the late EIA approval; this was also beyond the plaintiff's control. The report by Tanisoft Sdn Bhd is unreliable as it was made five months after the plaintiff had left the project site.

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[28] The plaintiff's assertion that heavy rainfall affected the development works is, however, unsubstantiated by any documentary evidence. The amount of rainfall at the project site was, however, recorded by DW3. In one of his reports (D20) DW3 commented that 'Jumlah hujan sebanyak 711 mm selama 19 hari pada purata 37.42.mm/hari sesuai untuk menjalankan aktiviti menaman anak sawit dan penutup bumi'. This shows that the rainfall was not such as to prevent any work from being done on the site at all. DW3 testified that the rainfall was not unusually heavy or lengthy and that other development works can still be carried out. Even if the rainfall hindered the

development work, the plaintiff failed to notify the defendant in writing of such occurrence under section 14.04(2) of the agreement which provides for force majeure; if the plaintiff had done so, then the plaintiff could have relied upon subsection (3) and obtained a suspension of 90 days for assessment and remedial works. As the plaintiff has plainly failed to do so, it cannot now contend that their work was hindered by the occurrence of heavy rainfall.

[29] The plaintiff's assertion that at the final stages of the project they faced financial difficulties which affected their development work is unfounded. According to section 9.02 of the agreement the plaintiff is 'solely liable and singly responsible for providing complete financing for the development of the Project Development'. The loan granted to the plaintiff is for RM25m out of which RM23,935,050 had already been disbursed to the plaintiff. This shows that even with the defendant's security deposit of RM13m, the disbursement of the loan facilities to the plaintiff were unaffected. The plaintiff also failed to produce any evidence to show that their financial difficulties were attributed to the defendant's failure to provide the security deposit of up to RM25m.

[30] It is evident that concerns relating to the plaintiff's failure to submit progress reports, lack of minimum back up support including experienced staff, adequate workers, necessary machinery and equipment and other matters were raised at the various project management meetings from 1 January 2002 to 1 March 2004 and by the defendant in its letters to the plaintiff on 5 March 2003, 2 April 2003, 7 April 2003, 29 April 2003, 16 July 2003, 17 July 2003, 28 July 2003, 17 September 2003, 9 October 2003, 24 December 2003, 3 February 2004 and 17 February 2004. Matters came to a head on 4 May 2004 when the plaintiff wrote to the defendant proposing to hand over certain portions of the project development. In its reply dated 14 May 2004 the defendant asked the plaintiff to furnish detailed reports to check that the development works have been completed in accordance with the project specifications. As the plaintiff failed to furnish the detailed reports, the defendant wrote a reminder to the plaintiff on 2 June 2004. On 10 June 2004 the defendant wrote to the plaintiff informing that they were not agreeable to the plaintiff's proposal. On 20 June 2004 the plaintiff replied appealing for an extension of 6 months to complete the project development. Meanwhile, on 16 August 2004 the defendant received a letter dated 28 July 2004 from the plaintiff's solicitors claiming that due to the defendant's failure to provide the RM25m security deposit the plaintiff was unable to obtain the loan from the bank to finance the development of the project. The defendant replied to the plaintiff's solicitors on 6 August 2004 disputing the plaintiff's assertions. On 11 August 2004 the defendant wrote to the plaintiff rejecting the plaintiff's appeal and asked the plaintiff to complete and hand over the

project development by the due date. On 13 September 2004 the plaintiff abandoned all works and removed its equipment and machinery at the project site. No prior notice whatsoever was given by the plaintiff to the defendant. After this fact came to its attention the defendant wrote to the plaintiff on 21 September 2004 asking for an explanation. As the plaintiff failed to reply to the said letter the defendant issued another letter on 8 October 2004. The plaintiff also failed to respond to this reminder.

[31] It is clear that the plaintiff's abandonment of the project works was predicated on the defendant's rejection of its appeal for the six months extension. The plaintiff's complaint that it could not obtain loan facilities as contended in its solicitor's letter was not a relevant factor. There is no evidence to show that the bank stopped disbursing the loan to the plaintiff. The solicitor's letter was issued after the plaintiff made its appeal for an extension of time but before the defendant's reply on 11 August 2009. If this factor is so important then it should have been mentioned in the plaintiff's appeal letter but it was not. It is probably an afterthought intended to put pressure on the defendant to accede to their appeal for an extension of time. In the appeal letter the plaintiff merely said:

> ... kami merayu pada pihak tuan untuk diberi lanjutan tempoh selama 6 bulan untuk menyiapkan kerja-kerja diladang dengan sempurna.
>
> 2. Pihak kami telah berbelanja dengan jumlah yang besar dan pihak kami juga telah mengalami kerugian disebabkan untuk menyiapkan kerja-kerja ladang. Oleh kerana faktor hujan yang berlanjutan dan juga faktor-faktor lain, jadi pihak kami tidak dapat menyiapkan kerja-kerja seperti yang dirancang. Pihak kami telah dapat mengatasi masalah-masalah yang menyebabkan kelewatan kerja-kerja di ladang dan sedang berusaha untuk menyiapkan kerja secepat mungkin.

[32] The defendant's rejection of the plaintiff's application for extension of time is in accordance with section 10.02(3) of the agreement which stipulates that there shall be no extension of time for completion. Further, there is also an express stipulation that time shall be of the essence of the agreement (section 18.12). In the circumstances of this case the defendant was entitled to reject the plaintiff's appeal for an extension of time. The stipulation as to time has not been waived by any subsequent conduct on the part of the defendant. On the contrary, the defendant has consistently reminded the plaintiff that the development project must be completed according to schedule.

[33] In this instance the law governing the performance of obligations by parties under a contract where time is essential is set out in s 56 of the Contracts Act 1950. Section 56(1) provides as follows:

> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

[34] In this case the plaintiff promised to complete and hand over the project within 36 months. The plaintiff has not only failed to wholly perform the obligation; it has also refused to perform its promise in its entirety. The agreement is therefore voidable at the defendant's option. In fact when it became clear that the plaintiff had no intention of performing its obligations under the agreement the defendant was left with no option but to terminate the agreement. This the defendant did under its solicitor's letter dated 18 August 2005 pursuant to s 40 of the Contracts Act 1950. For the foregoing reasons the question is answered in the affirmative.

[35] In consequence of the above finding section 14.03(1) of the agreement comes into play so that by reason of the plaintiff's breach of its obligations under the agreement the plaintiff is not entitled to any form of compensation and any portion of the consideration. For the reasons cited above the plaintiff's claim is dismissed with costs.

THE DEFENDANT'S COUNTERCLAIM

[36] The consequences of a breach of a contract is set out in s 74 of the Contracts Act 1950 which contains the rules governing compensation for loss or damage caused by breach of contract. As stated by Ong FCJ in *Toeh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39 (FC), the rule in s 74 emanates from the rule expounded in *Hadley v Baxendale*. Under s 74 the party may recover compensation under two limbs, namely (i) loss or damage which naturally arose in the usual course of things; or (ii) loss or damage which the parties knew, when they made the contract, to be likely to result from a breach of it. The second limb of s 74 has also been treated to be similar to the second limb of *Hadley v Baxendale*, which is, that a party may recover damages which may 'reasonably be supposed to have been in contemplation of both the parties, at the time they made the contract' (*Tan Chin Kim Sawmill and Factory Sdn Bhd & Anor v Lindeteves-Jacoberg (M) Sdn Bhd & Anor* [1980] 2 MLJ 204; *Tan Chong & Sons Motor Company (Sdn) Berhad v Alan McKnight* [1983] 1 MLJ 220 (FC); *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76 (SC); *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ

569 (SC); *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 (FC)).

[37] The defendant's counterclaim for damages is made up of four items. The first item is for loss of potential income of RM13,750,000. According to Kenangan bt Tarmin ('DW2') the defendant's finance manager, the oil palm plantations should have been handed over in 2004 in a condition ready to bear fruits. DW2 applied a factor of three years because it would take three years to complete the project development until it is ready to bear fruits. DW2 also based the computation on the profit and loss projection which was prepared during the discussions on the working paper. DW2 was not challenged or contradicted on this point. DW2 said:

> Jumlah RM13,750,000.00 ini diperolehi dengan mengambil kira pendapatan tahun 3, 4 dan 5 yang berjumlah keseluruhan sebanyak RM25,000,000.00 iaitu RM5,000,000.00 untuk tahun 3, RM8,000,000.00 untuk tahun 4 dan RM12,000,000.00 untuk tahun 5, tolak kos langsung dan overhead untuk tahun 3, 4 dan 5 yang berjumlah keseluruhan RM11,250,000.00.

[38] The object of an award of damages is to give a party compensation for the damage, loss or injury he has suffered. The loss of potential income is a consequential loss flowing from the plaintiff's breach. It was anticipated that after the completion and handing-over of the project development to the defendant, the defendant would take over the running and management of the oil palm plantations and derive income from the harvesting of the oil palm fruits. Therefore, it must have been within the contemplation of the parties when they entered into the agreement that the defendant would be likely to suffer a loss of income from the harvesting and sale of the oil palm fruit from the plaintiff's breach of the agreement. Applying the principles enunciated, this loss is recoverable.

[39] The second item is for RM717,797 being the rental for the lands paid by the defendant to YAKIN at RM150 per acre for the period from January 2007 onwards. DW2 produced a lease agreement dated 13 November 2001 between YAKIN (lessor) and Teroka Pertiwi Sdn Bhd (lessee) to show the payment of the rent to YAKIN. Based on the annual rental of RM1,543,650, the figure of RM717,797 is calculated for the period of three years before the oil palm plantation is ready for harvesting. The rental is not a loss or damage which arose in the usual course of things from the breach. At all material times the lands were leased to the defendant and the defendant enjoyed and continued to enjoy the possession of the lands as a lessee. The defendant did

not suffer any loss as a lessee. This is also not what the court would consider as a loss or damage which falls under the second limb of s 74. In the premises this claim is not recoverable.

[40] The third item relates to the loss of the security deposit of RM13m. DW2 said that as at 31 December 2004 the bank confirmed that the balance of the investment certificate was RM13,648,101.31. As the plaintiff failed to repay the loan facility the bank debited the defendant's money to settle the plaintiff's debts. The loss of the security deposit of RM13m is liable to be reimbursed by the plaintiff under the express provisions of the agreement. Section 14.03(4) of the agreement stipulates certain consequences in the event the agreement is terminated due to the plaintiff's default or breach. It is expressly provided that the plaintiff shall be liable to reimburse any sum which have been utilised under the facilities. The plaintiff's aforesaid liability is consistent with subsection (1) of section 14.03 which stipulates that the plaintiff shall not be paid any portion of the consideration. Reading subsections (1) and (4) together, it means that in the event the agreement is terminated the plaintiff is not entitled to receive the consideration of RM40m or any part thereof. In this case the security deposit of RM13m have been utilised by the bank to set off the plaintiff's debt. Subsection (4) gives effect to this provision so as to make the plaintiff liable to reimburse the defendant in the said sum. The plaintiff's liability to reimburse the defendant is contractual and it is binding on the plaintiff. For the foregoing reasons this claim is recoverable.

[41] The fourth and last item of RM27,482,090 is the amount of loss for being deprived of a duly completed oil palm plantation in accordance with the agreement. DW2 said that based on a report (exh D29) prepared by Intra Harta Consultants (South) Sdn Bhd dated 23 July 2005 the market value of the completed oil palm estate which is about three years of age is valued at RM41,164,000. After deducting the costs incurred of RM13,681,910 the loss suffered by the defendant is RM27,482,090. Intra Harta did not prepare a formal report. Khairul Anuar bin Harun (DW4) the managing director of Intra Harta agreed in cross-examination that even though a formal report should have been prepared no formal report was prepared. DW4 did not give any reasons why he did not prepare the formal report. D29 is only a preliminary estimate; it has not been verified by a formal report and valuation. As the views expressed in D29 are only tentative and not conclusive little or no weight can be attached to D29. For this reason the claim is not proven and is not recoverable.

A **[42]** For the foregoing reasons the defendant's counterclaim is allowed with costs in respect of (i) RM13,750,000 for the loss of potential income; and (ii) RM13m for the reimbursement of the security deposit.

Plaintiff's claim dismissed with costs and the defendant's counterclaim allowed B *with costs.*

Reported by Kanesh Sundrum

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